Area Trade Bindery Co. *and* Graphic Communications Union Local 404, Graphic Communications Conference of the International Brotherhood of Teamsters. Cases 31–CA–26970 and 31–CA–27500

February 29, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On May 16, 2006, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel and the Charging Party each filed cross-exceptions with supporting argument. The Charging Party filed an answering brief to the Respondent's exceptions and to the General Counsel's cross-exceptions.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified.[4]

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit and, if requested by the Union, to rescind any unilateral changes in wages, benefits, and conditions of employment implemented on March 17, 2005, and thereafter. We shall order the Respondent to make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's implementation of new terms and conditions of employment in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, we shall require Respondent, upon request of the Union, to rescind the changes in the 401(k) plan that it made on July 30, 2004, restore the 401(k) plan that existed before the unlawful change, and make employees whole for the losses they suffered in the manner set forth in *Merryweather Optical Co*., 240 NLRB 1213 (1979).

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh. Pursuant to this delegation, Board Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) of the Act by: (i) withdrawing recognition from the Union and refusing to bargain with the Union from June to November 2004, and (ii) unilaterally changing its contribution levels for the employees' 401(k) plan in July 2004, without notice to or bargaining with the Union.

The Charging Party excepts to the judge's failure to find separate violations of the Act for certain proposals implemented by the Respondent, including its wage, no-strike, management-rights, subcontracting, and union-security proposals. The Charging Party, citing *McClatchy Newspapers*, 321 NLRB 1386, 1390 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998), argues that those proposals could not have been implemented even if the parties had been at impasse. We deny the Charging Party's exception because it impermissibly enlarges upon the General Counsel's theory of the case, which does not include any allegation that the Respondent's implementation of those proposals independently violated the Act. *Kimtruss Corp.*, 305 NLRB 710, 711 (1991).

[3] In adopting the judge's conclusion that the parties were not at impasse on March 17, 2005, we consider the factors identified in *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB,* 395 F.2d 622 (D.C. Cir. 1968), and weighed by the judge. In particular, we rely on the limited number of postsettlement negotiation sessions held prior to the Respondent's declaration of impasse, the Respondent's failure to explain its regressive changes to prior tentative agreements and proposals, and the Respondent's rejection of the Union's counteroffer and its subsequent declaration of impasse without any discussion over the Union's proposals. In making this finding, however, we do not rely on the judge's citation to *Jano Graphics, Inc.*, 339 NLRB 251 (2003), nor do we rely on the parties' conduct after March 17, 2005.

Member Schaumber, in adopting the judge's conclusion that the parties were not at impasse on March 17, 2005, reasserts his general views that a party's unwillingness to engage in mediation is not necessarily an indicia of bad faith, and that both parties need not agree that an impasse has been reached in order for the Board to find the parties are at impasse.

[4] We shall modify the judge's remedy to include the Board's traditional make-whole language for any loss of wages and benefits resulting from the Respondent's unilateral implementation of its final offer in violation of Sec. 8(a)(5) and (1) of the Act. In addition, we shall modify the judge's recommended Order and substitute a new notice to conform to our findings and to the Board's standard remedial language.

The Charging Party requests that the Board order the Respondent to reinstate tentative agreements that were rescinded in the Respondent's final offer. The Charging Party cites cases in which the Board ordered a similar remedy. See *Driftwood Convalescent Hospital,* 312 NLRB 247 (1993), and *Suffield Academy*, 336 NLRB 659 (2001). The cases cited by the Charging Party, however, involve instances in which the Board found a violation for unlawful regressive bargaining. Here, the General Counsel did not allege that the Respondent's withdrawal from tentative agreements independently violated the Act, nor did the judge find such a violation. Accordingly, although we consider the Respondent's withdrawal from tentative agreements as evidence that the parties were not at impasse when the Respondent implemented its final offer, we deny the Charging Party's request for a separate remedy because the violation was not alleged or found.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Area Trade Bindery Co., Burbank, California, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the succeeding paragraphs accordingly.

"(a) Recognize the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit described below."

2. Substitute the following for paragraph 2(c) and reletter the succeeding paragraphs accordingly.

"(c) Make whole all employees adversely affected by the Respondent's unilateral changes, as provided in the 'amended remedy' section."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Graphic Communications Union Local 404, Graphic Communications Conference of the International Brotherhood of Teamsters, by unilaterally implementing its final contract offer to the Union on March 17, 2005.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT refuse to meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment including contributions to our 401(k) plan, union security, and wages.

WE WILL NOT refuse to bargain collectively by unilaterally implementing changes in our contributions to our employees' 401 (k) plans.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL recognize the Union as the collective-bargaining representative of our employees in the unit described below.

WE WILL, upon request, meet and bargain with the Union as the exclusive-bargaining representative of our employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> Included: All full time and regular part time production and maintenance employees, including machine operators, employed by us at our facility located at 157 W. Providencia Avenue, Burbank, California.
>
> Excluded: All other employees, including professional employees, office clerical employees, drivers, guards and supervisors as defined in the Act.

WE WILL rescind any unilateral changes we have implemented in our employees' terms and conditions of employment.

WE WILL make whole all of our employees who were adversely affected by the unilateral changes, with interest.

AREA TRADE BINDERY CO.

Brian D. Gee, Esq. and *Joanna F. Silverman, Esq.,* for the General Counsel.

Andrew B. Kaplan, Esq. and *Jeffrey W. Mayes, Esq. (Silver & Freedman),* of Los Angeles, California, for the Respondent.

Daniel B. Smith, Esq. (O'Donnell, Schwartz & Anderson P.C.), of Washington, D.C., for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Los Angeles, California, on March 6–8, 2006. On August 13, 2004, Graphic Communications Union, Local 404, Graphic Communications Conference of the International Brotherhood of Teamsters (the Union) filed the charge in Case 31–CA–26970 alleging that Area Trade Bindery Co. (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On September 13, 2005, the Union filed the charge in Case 31–CA–27500 against Respondent. On January 12, 2006, the Regional Director for Region 31 of the National Labor Relations Board (the

Board) issued a consolidated complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation, with an office and principal place of business in Burbank, California, where it has been engaged in business as a commercial bindery. Respondent, in conducting its business operations, annually sells and ships goods or services valued in excess of $50,000 directly to points outside the State of California. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent operates a commercial bindery in Burbank, California. On May 8, 2002, the Union was certified as the exclusive collective-bargaining representative of Respondent's production and maintenance employees.

On August 13, 2004, the Union filed a charge in Case 31–CA–26970 alleging that Respondent had violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union, refusing to bargain with the Union, and unilaterally changing its practice of making contributions to its employees' 401(k) plans.

On November 17, 2004, the parties entered into an informal settlement agreement resolving the case. As part of the settlement agreement Respondent posted a notice stating that it would not: (1) refuse to meet and bargain with the Union; (2) withdraw recognition from the Union; and (3) implement any unilateral changes.

On December 15, 2004, and on January 28, 2005, the parties met in an unsuccessful attempt to negotiate an initial contract. The parties did not reach agreement and on March 17, 2005, Respondent implemented the terms of its "last, best and final offer" to the Union.

Within this factual framework, the General Counsel alleges that Respondent unlawfully implemented its final proposal in the absence of a lawful bargaining impasse. Respondent contends that the parties were at impasse and, therefore, it could lawfully implement the terms of its final proposal.

Thus, the principal issue, involving Respondent's implementation of its "last, best, and final offer" and the resultant changes in the bargaining unit employees' terms and conditions of employment, is whether the parties had reached an impasse in their contract negotiations so as to have permitted the implementation of the proposed contract.

The Facts

As stated above, the Union was certified as the exclusive collective-bargaining representative of Respondent's production and maintenance employees on May 8, 2002. From August 5, 2002, through May 21, 2003, the Respondent and the Union met for 15 bargaining sessions. At the May 21, 2003 bargaining session Respondent's attorney stated that Respondent was opposed to the Union's proposal of a union-security agreement, requiring employees to join a labor organization and pay money in order to work. Respondent's attorney also stated that Respondent was opposed to the Union's dues-checkoff proposal because Respondent did not want to be the Union's bill collector. The Union's attorney and chief negotiator stated that in light of the Employer's position on union security and dues checkoff there was no point in continuing bargaining that date or setting another date for bargaining.

The Union did not request further bargaining until June 2004. In January 2004, the Union elected a new president and vice president. In March or April, the Union retained a new attorney. In June 2004, the Union asked Joseph O'Connor, an International representative, to be its chief negotiator with Respondent. On or about June 8, 2004, O'Connor called Andrew Kaplan, Respondent's attorney and chief negotiator, in an attempt to resume collective bargaining. Kaplan stated that he believed that the Union had abandoned the bargaining unit since he had not heard from the Union in over a year. O'Connor insisted that the Union had not abandoned the bargaining unit. Kaplan said he would discuss the matter with his client. O'Connor sent Kaplan two written requests to bargain in June 2004. On June 29, 2004, Kaplan responded stating that Respondent had appropriately withdrawn recognition from the Union. On or about July 30, unknown to Kaplan, Respondent ceased making contributions on behalf of its employees to its 401(k) plan. Respondent did not give the Union notice or an opportunity to bargain over the change in 401(k) contributions.

Thereafter, on August 13, 2004, the Union filed its charge in Case 31–CA–26970. On November 17, 2004, the parties entered into a settlement agreement whereby the Respondent agreed, inter alia, to bargain in good faith with the Union and not to make unilateral changes.

The first bargaining session following the settlement agreement occurred on December 15, 2004. Kaplan, Chris Planter, plant manager, and Doug Moore, a representative from the local printer's association, were present for Respondent. O'Connor, Paul Garcia, president, Doug Brown, vice president, Jorge Perez, International representative, and employees Daniel Solorzano and Alain Beechdikian, were present for the Union. The parties reviewed their prior tentative agreements. There were several open issues on which the parties had not yet

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

reached tentative agreement including, wages, health care, union security, dues checkoff, bereavement, and holidays. After an hour of reviewing the prior tentative agreements, Kaplan presented the Union with a document entitled "Area Trade Collective Bargaining Proposal December 16, 2004."[2] Kaplan then stated that since the Union had requested bargaining he expected a counterproposal from the Union. O'Connor answered that the Union was not prepared to respond that day. O'Connor stated that he would like to respond to the Employer's proposal the next day and at a later date provide Kaplan with the Union's counterproposal. Kaplan did not agree to negotiate the following day on the ground that the Union was not prepared to negotiate. Kaplan stated that he expected a union counterproposal by December 27, 2004. The parties then adjourned for the day.

Later on December 15, Kaplan wrote O'Connor requesting a formal counterproposal by December 27, 2004, and stating that if Respondent did not receive a formal response by that date, Respondent would consider its December 15 written proposal to be its "last, best, and final offer." Kaplan further warned that Respondent would "treat the Union's failure to make any counter offer as a rejection of [Respondent's] 'last, best, and final offer' and the parties would be at impasse." Kaplan expressed his position that the parties were at impasse over the issue of union security. Kaplan reiterated his position that Respondent "was philosophically opposed to the concept of making people pay money to any third party, including a union, in order to retain their jobs." Finally, Kaplan stated that he would not agree to meet again until Respondent received the Union's formal response to Respondent's proposal of December 15.

On December 27, O'Connor sent Kaplan the Union's formal proposal and he requested further dates for negotiation sessions. The following day, Kaplan wrote O'Connor stating that the Employer stood by all of its proposals and rejected the Union's counterproposals in its entirety. While Kaplan agreed to meet with the Union, he stated, "[T]he Company is not certain as to the purpose of this meeting." Kaplan then wrote that "the Company's proposal of December 15, 2004 represents its last, best and final offer." Kaplan added that if the Employer's proposal was not accepted at the parties' next meeting, "the parties will be at impasse, in which case the Company will implement selected portions of its last, best and final offer." O'Connor agreed to meet with Kaplan on January 28, 2005.

On January 28, the parties met for the second time following the settlement agreement. Kaplan stated that the December 15 proposal was his final proposal and that he believed the parties were at impasse. O'Connor stated he believed that the parties were not at impasse and suggested that the parties look into Federal mediation. Kaplan refused to meet with a Federal mediator. This meeting lasted approximately 20 minutes.

On March 17, 2005, Kaplan wrote O'Connor stating that Respondent's offer of December 15, 2004, was its last best and final offer, that the Union's counterproposal was rejected in its entirety. Kaplan wrote that the offer of the use of Federal Mediation and Conciliation was rejected and that the parties were at impasse. Finally, Kaplan notified the Union that Respondent had implemented its proposals on management rights, subcontracting, no strikes, validity, premium pay, vacation, wages, layoff and recall, hours, holidays, 401(k) plan, pay day, and union security.

On June 25 and 26, 2005, the Union held a ratification vote of a proposed contract. However, the proposed contract was not Respondent's last, best, and final offer but rather a contract O'Connor put together from the prior tentative agreements, Respondent's final offer and the Respondent's employee handbook. The employees voted in favor of this document. However, Kaplan wrote O'Connor asking why the Union was holding ratification on a document Respondent had not offered to the Union. On August 10, O'Connor forwarded the document ratified by the employees to Kaplan for Respondent's signature. On August 15, Kaplan wrote back raising questions as to whether the proposed contract was consistent with that offered to the employees. Further, Kaplan stated that Respondent would not sign the proposed document because it was not consistent with its last, best, and final offer.

On September 1, O'Connor wrote Kaplan requesting dates to resume bargaining. On September 7, Kaplan responded that Respondent's proposal of December 15, 2004, was its last, best, and final offer and since the Union was not prepared to accept it, the parties were at impasse. Thereafter, on September 13, 2005, the Union filed the charge in Case 31–CA–27500, alleging that Respondent refused to bargain in good faith.

III. ANALYSIS AND CONCLUSIONS

A. The Alleged Impasse

As stated earlier, the first issue is whether the parties reached impasse in their negotiations so as to permit Respondent to implement its final offer. By definition, an impasse occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 543 (1988). After an impasse has been reached on one or more subjects of bargaining, an employer may implement any of its preimpasse proposals. *Western Publishing Co.*, 269 NLRB 355 (1984). "A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973). In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub. nom. *Television Artists AFTRA,* 395 F.2d 622 (D.C. Cir. 1968), the Board listed the following factors for determining whether an impasse existed:

> The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

The Board has further held that, even if impasse is reached over an issue, it may be broken if one of the parties moves off its

[2] Of the 11 proposals submitted by Kaplan, 4 were changes from prior tentative agreements and 5 were regressive proposals.

previously adamant position. *Tom Ryan Distributors*, 314 NLRB 600, 604–605 (1994), enfd. mem. 70 F.3d 1272 (6th Cir. 1995) (no impasse found where union demonstrated intent to move on key issue, parties had met only eight times before employer declared impasse, and the key issue had been discussed conceptually but not in detail). "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982), quoting 243 NLRB 1093–1094 (1979). See *Royal Motor Sales*, 329 NLRB 760 (1999), enfd. mem. *Royal Motor Sales v. NLRB,* 2 Fed. Appx. 1 (D.C. Cir. 2001).

Finally, because impasse as a defense to a charge of an unlawful unilateral change, the burden of proof rests on the party asserting that impasse exists. *North Star Steel Co.*, 305 NLRB 45 (1991); *Roman Iron Works*, 282 NLRB 725 (1987).

In the instant case, the parties met in 15 bargaining sessions from August 5, 2002, to May 21, 2003, prior to the settlement agreement in Case 31–CA–26970. However, the parties only met two times after the November 17, 2004 settlement agreement. Both of these sessions were very short and there was no discussion concerning either party's proposals. There was no discussion of Respondent's changes in prior tentative agreements. After the first session, Kaplan was threatening to declare impasse. At the second session Respondent was already declaring impasse over the protest of the Union and refusing the offer of Federal mediation. I find the fact that such bargaining took place for such a short period of time weighs against a finding of impasse. See *Jano Graphics, Inc*., 339 NLRB 251 (2003). The refusal of the Respondent to agree to mediation is another factor supporting a finding that a point of impasse had not yet been reached.

Respondent argues that there was no prospect of an agreement and that the Union was never going to agree to an agreement without union security and dues checkoff. Prior to the Union's counterproposal, Kaplan was already declaring that the parties were at impasse on union security and dues checkoff. His declarations of impasse preempted bargaining as did his total rejection of the Union's counterproposal. Subsequent to the unilateral changes of March 17, 2005, the Union proposed an agreement which did not contain union security or dues checkoff but Kaplan still refused to meet and negotiate.

While Respondent argued in January and March 2005, and again at the instant hearing that the parties were at impasse, "both parties must believe they are at the end of their rope." *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1177 (5th Cir. 1982). See also *NLRB v. Powell Electrical Mfg. Co*., 906 F.2d 1007, 1011–1012 (5th Cir. 1990). In *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), the Board concluded that the parties had not yet reached a legal impasse even though the employer asserted that it had reached its final position, as during the final session, the charging party union "not only continued to declare its intention to be flexible, but demonstrated this throughout its dealings with the Respondent that day." The Board stated:

> Where as here, a party who has already made significant concessions indicates a willingness to compromise further, it would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because the party is unwilling to capitulate immediately and settle on the other party's unchanged terms. . . . Further, even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so. [Id. at 586.]

In this case, the Union argued that the parties were not at impasse. The Union suggested that the parties meet with the Federal Mediation and Conciliation Service. It is not sufficient for a finding of impasse to simply show that the Employer had lost patience with the Union or its chief negotiator. Impasse requires a deadlock. As the Board stated in *Powell Electrical Mfg. Co.,* 287 NLRB 969, 973 (1987):

> That there was no impasse when the Company declared is not to suggest that if the parties continued their sluggish bargaining indefinitely there would have been agreement on a new contract. Such a finding is not needed, nor could it be made without extra-record speculation, to find on this record that when the Company declared an impasse there was not one, even as far apart as the parties were. They had most of their work ahead of them, and judging by the opening sessions clearly had different goals in mind for a contract. Whether their differences ever would have been resolved cannot be known; but that is the nature of the process. It is for the parties through earnest, strenuous, tedious, frustrating and hard bargaining to solve their mutual problem—getting a contract—together, not to quit the table and take a separate path.

As stated above, the fact that Kaplan believed that the Union would never agree to Respondent's contract proposals does not establish an impasse. In light of the limited bargaining after the settlement, Kaplan's rush to declare impasse and the Union's willingness to continue bargaining, I cannot find the parties had reached a deadlock in their negotiations. Kaplan could not create an impasse simply by insisting that he was not going to move from his bargaining position and completely rejecting the Union's proposals, without discussion.

Here, in September 2005, O'Connor proposed an agreement, which Respondent had not agreed to, without union security and dues checkoff. Obviously Respondent was not required to agree to or sign such an agreement. Thus, any alleged impasse was broken by the Union's significant change in position. However, Kaplan still refused to meet and negotiate.

I find that in March 2005, there was still more bargaining remaining before agreement or impasse was reached. In general, impasse on one or several issues does not suspend the obligation to bargain on remaining, unsettled issues. *Patrick & Co.*, 248 NLRB 390 (1980), enfd. mem. 644 F.2d 889 (9th Cir. 1981); *Atlas Tack Corp*., 226 NLRB 222 (1976), enfd. mem. 559 F.2d 1201 (1st Cir. 1977).

In summation, I find that in light of the limited bargaining after the settlement and Kaplan's rush to declare impasse, I cannot find the parties had reached a lawful impasse or deadlock in their negotiations in March 2005. Further, Respon-

dent's lack of good faith, evidenced by its unfair labor practices in June and July 2004, discussed below, supports a finding that no good-faith impasse was reached in March 2005.

As I have found that on March 17, 2005, no lawful impasse existed, Respondent's implementation of the terms of its final offer that day, without the agreement of the Union, was violative of Section 8(a)(1) and (5) of the Act. *Royal Motor Sales*, 329 NLRB 760 (1999); *WPIX, Inc.*, 293 NLRB 10 fn. 1 (1989), enfd. 906 F.2d 898 (2d Cir. 1990); *Sacramento Union*, 291 NLRB 552, 557 (1988).

B. The Withdrawal of Recognition in June 2004

As stated earlier, when O'Connor sought to resume negotiations in June 2004, Kaplan stated that Respondent had appropriately withdrawn recognition from the Union. Kaplan contended that he believed that the Union had abandoned the bargaining unit.

In *Levitz Furniture Co. of the Pacific,* 333 NLRB 717, 717 (2001), the Board held:

> After careful consideration, we have concluded that there are compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty or even disbelief concerning unions' majority status. We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule [Celanese Corp., 95 NLRB 664 (1951)] and its progeny insofar as they permit withdrawal on the basis of good-faith doubt. Under our new standard, an employer can defeat a post withdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status.

In the instant case, Respondent merely contended that it believed the Union had abandoned the unit, it did not offer any evidence that the Union had actually lost the support of the majority of the bargaining unit employees.

In *Mountain Valley Care & Rehabilitation Center*, 346 NLRB 281, 283 (2006), the Board rejected an employer's attempt to justify withdrawal of recognition by claiming that it thought that the union had abandoned the bargaining unit: "Any uncertainty the Respondent may have had could have been resolved simply by asking the International Union about its intentions or by filing an RM petition." Additionally, the Board has held, "The Union's reassertion of its bargaining rights . . . negate[s] any inference to be drawn from the preceding period of inactivity." *Spillman Co*., 311 NLRB 95, 95–96 (1993). In the instant case, there is no evidence that the Union was not willing or able to represent the employees at the time its majority status was questioned. Nor was there any evidence that the Union had lost the support of the majority of the bargaining unit employees. Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union in June 2004, and refusing to bargain collectively with the Union between June and November 2004. It follows that Respondent violated Section 8(a)(1) and (5) by changing its contributions to its employees' 401(k) plans, without notice to and bargaining with the Union, on or about July 30, 2004.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and by unilaterally implementing its final contract proposal on March 17, 2005.

4. Respondent has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union and refusing to bargain with the Union from June to November 2004.

5. Respondent violated Section 8(a)(1) and (5) by unilaterally changing its contribution to its employees' 401(k) plan in July 2004, without notice to and bargaining with the Union.

6. Respondent's conduct in paragraphs 3, 4, and 5 above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Area Trade Bindery Co., of Burbank, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively by unilaterally implementing its final contract offer to the Union on March 17, 2005.

(b) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit described.

(c) Refusing to meet and bargain with the Union as the exclusive collective-bargaining representative of Respondent's employees in the appropriate bargaining unit with respect to rates of pay, hours of employment, and other terms and conditions of employment including contributions to health insurance, union security, and wages.

(d) Refusing to bargain collectively by unilaterally implementing changes in its contributions to its employees' 401(k) plan.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate bargaining unit described below with respect to rates of pay, hours of employment, and other terms and conditions, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> Included: All full time and regular part time production and maintenance employees, including machine operators, employed by the Employer at its facility located at 157 W. Providencia Avenue, Burbank, California.
>
> Excluded: All other employees, including professional employees, office clerical employees, drivers, guards and supervisors as defined in the Act.

(b) On request by the Union, rescind any unilateral changes it has implemented in its employees' terms and conditions of employment.

(c) Within 14 days after service by the Region, post at its facility in Burbank, California, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2004.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by Region 31 attesting to the steps the Respondent has taken to comply herewith.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."